Tay Hup Lian v Lai Kee Peng (Messrs Lai Kee Peng & Associates)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1997 OF 2009

ZAINUN ALI, JEFFREY TAN AND ALIZATUL KHAIR JJCA

11 OCTOBER 2011

Civil Procedure — Judgment and orders — Default order — Remedy provided by — Whether default order directed stakeholder to release retention sum to purchaser

Contract — Agreement — Sale and purchase — Duties of stakeholder — Whether stakeholder entitled to release retention sum to purchaser — Whether stakeholder acted in accordance with default order — Whether default order directed stakeholder to release retention sum to purchaser

Histyle Sdn Bhd ('the purchaser') had entered into a sale and purchase agreement ('SPA') with the appellant for the purchase of 12 units of shop lots in Kluang Plaza ('Plaza'). The respondent was the firm of solicitors, who had acted for the purchaser in the SPA. The respondent had retained the sum of RM500,000 from the purchase price ('the retention sum') as stakeholder until removal of the caveats and registration of the properties free from all encumbrances in favour of the purchaser. The retention sum became the subject matter of a consent order recorded in an action by a group of purchasers of various shop lots in the Plaza against the developer of the Plaza and the purchaser. The consent order dated 24 October 1994, ordered the respondent to hold the retention sum as a stakeholder for the group purchasers. In 1996, the appellant had filed a writ action against the purchaser claiming release of the retention sum due to it. However, on 24 February 2004, due to the non-attendance of the appellant's counsel on the case management date, the appellant's action was struck out and judgment in default of appearance was entered against the appellant in respect of the purchaser's counterclaim for forfeiture of the retention sum ('the default order'). In pursuance of the default order the respondent paid the retention sum to the purchaser. In the meantime, the appellant appealed against the default order. On 1 April 2008, the Court of Appeal allowed the appellant's appeal and set aside the default order. On 20 October 2008, the appellant applied for an order to compel the respondent to deposit the retention sum. At this juncture, it was the respondent's case that the release sum was effected in compliance with the default order. The High Court judge dismissed the appellant's claim on the grounds that the respondent

had acted in accordance with a lawful and valid court order. This was the appellant's appeal against that order.

Held, allowing the appeal with costs fixed at RM10,000:

(1) The default order in the instant appeal did not require due compliance by the respondent as the remedy provided was only declaratory in nature. The default order granted the purchaser a declaration that the retention sum was to be forfeited by the purchaser. There was no direction given to the respondent to forthwith pay out the retention sum to the purchaser. Thus, the High Court judge had erred when she decided that the respondent had acted in accordance with a lawful and valid court order. By releasing the retention sum to the purchaser, the respondent was in error and had to account to the appellant (see paras 17–18).

(2) Further, the consent order of 24 October 1994 required the respondent to hold the retention sum as a stakeholder in favour of the group of purchasers. The respondent was therefore confronted with two High Court orders, namely the default order and the consent order (see para 19).

(3) In the circumstances the respondent was ordered to deposit the retention sum into court (see para 20).

[Bahasa Malaysia summary

Histyle Sdn Bhd ('pembeli') memasuki perjanjian jual beli ('PJB') dengan perayu untuk pembelian 12 unit lot kedai di dalam Kluang Plaza ('Plaza'). Responden adalah firma peguam, yang bertindak untuk pembeli dalam PJB tersebut. Responden telah memegang sejumlah RM500,000 daripada harga belian tersebut ('wang tahanan') sebagai pemegang amanah sehingga pemotongan kaveat-kaveat dan pendaftaran hartanah bebas daripada kesemua halangan dan memihak kepada pembeli. Wang tahanan menjadi perkara perintah izin direkodkan di dalam tindakan oleh kumpulan pembeli pelbagai lot kedai di Plaza tersebut terhadap pemaju Plaza dan pembeli. Perintah izin bertarikh 24 Oktober 1994, memerintahkan responden memegang wang tahanan tersebut pemegang amanah untuk kumpulan pembeli. Pada tahun 1996, perayu memfailkan tindakan writ terhadap pembeli mendakwa pelepasan jumlah tahanan akibatnya. Walau bagaimanapun, pada 24 Februari 2004, akibat ketidakhadiran peguam perayu pada tarikh pengurusan kes, tindakan perayu dibatalkan dan penghakiman ingkar ketidakhadiran dimasukkan terhadap perayu berkaitan tuntutan balas pembeli untuk perampasan wang tahanan ('perintah ingkar'). Berikutan perintah ingkar responden membayar wang tahanan kepada pembeli. Sementara itu, perayu merayu terhadap perintah ingkar tersebut. Pada 1 April 2008 Mahkamah Rayuan membenarkan rayuan perayu dan mengetepikan perintah ingkar. Pada 20 Oktober 2008, perayu memohon untuk perintah memaksa responden

untuk mendepositkan wang tahanan tersebut. Pada peringkat ini, adalah kes responden bahawa jumlah pelepasan dikuat kuasakan dalam mematuhi dengan perintah ingkar. Hakim Mahkamah Tinggi menolak tuntutan perayu atas alasan bahawa responden telah bertindak mengikut perintah mahkamah yang sah. Ini adalah rayuan perayu terhadap perintah tersebut.

Diputuskan, membenarkan rayuan dengan kos ditetapkan pada RM10,000:

(1) Perintah ingkar dalam rayuan ini tidak memerlukan pematuhan oleh responden memandangkan remedi yang diperuntukkan hanya bersifat perisytiharan. Perintah ingkar memberikan pembeli perisytiharan bahawa wang tahanan akan dirampas oleh pembeli. Tiada arahan diberikan kepada responden untuk serta merta membayar wang tahanan kepada pembeli. Oleh itu, hakim Mahkamah Tinggi tersilap apabila beliau memutuskan bahawa responden telah bertindak dengan perintah mahkamah yang sah. Dengan melepaskan wang tahanan kepada pembeli, responden adalah silap dan terpaksa membayar kepada perayu (lihat perenggan 17–18).

(2) Selanjutnya, perintah izin yang bertarikh 24 Oktober 1994 mengkehendaki responden memegang wang tahanan sebagai pemegang amanah dalam memihak kumpulan pembeli. Responden oleh itu dihadapkan dengan dua perintah Mahkamah Tinggi, iaitu perintah ingkar dan perintah izin (lihat perenggan 19).

(3) Dalam keadaan ini, responden diperintahkan untuk mendepositkan wang tahanan ke dalam mahkamah (lihat perenggan 20).]

Notes

For a case on sale and purchase, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2991.

Cases referred to

Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116, SC (refd)

MS Murthi (Murthi & Partners) for the appellant.
Wong Hok Mun (Azim, Tunku Farik & Wong) for the respondent.

Zainun Ali JCA (delivering judgment of the court):

THE BROADS GROUND

[1] Central to this appeal is the issue of the duties of a stakeholder in a sale and purchase agreement. The respondent a firm of solicitors was the defendant in the court below. It is also the stakeholder. The appellant is the vendor. The purchaser was one Histyle Sdn Bhd.

[2] This is an appeal against the decision of the High Court dismissing the appellant's originating summons for an order directing the respondent to deposit the retention sum under the agreement, into court. It is a fact that the respondent had released the retention sum to the purchaser. It is the respondent's case that this was done in compliance with an order of the High Court dated 24 February 2004.

THE FACTUAL BACKGROUND

[3] By a sale and purchase agreement dated 1 January 1994 ('the SPA'), the appellant sold 12 units of shop lots in Kluang Plaza Johor to Histyle Sdn Bhd (the purchaser). The respondent is a firm of solicitors who acted for the purchaser in the SPA.

[4] Prior to this, the appellant had purchased the said properties from the developer, Lian Foong Housing Sdn Bhd ('the developer').

[5] In view of existing caveats on the land, the respondent retained RM500,000 ('the retention sum') from the purchase price as stakeholder pursuant to the SPA. The respondent was authorised to release the retention sum to the appellant's nominated recipient ie the developer, subject to fulfillment of certain conditions stipulated in cl 4 of the SPA. Amongst others, it was incumbent on the appellant to cause the removal of the caveats and registration of the properties in favour of the purchaser, free from all encumbrances.

[6] The caveats have since been removed. However the respondent refused to release the retention sum on the ground that the same has become the subject matter of a consent order dated 24 October 1994, (the consent order) recorded in an action filed by a group of purchasers of various shop lots in Kluang Plaza against the developer and the purchaser. By the said consent order, it was ordered that the respondent shall hold the retention sum of RM500,000 as a stakeholder of which the group purchasers were the beneficiaries.

[7] It is the appellant's contention that the release of the retention sum to the developer was to discharge the outstanding amount owed by the appellant under the original sale and purchase agreement between the parties. However due to the respondent's refusal to release the retention sum, the appellant contended that it has to pay the developer a sum of RM500,000, as a result of which the latter executed a deed of assignment assigning its interest in the retention sum to the appellant.

[8] In 1996, the appellant filed a writ action against the purchaser claiming for the release of the retention sum under the assignment. By an order dated

24 February 2004, the appellant's action was struck out due to the non-attendance of the appellant's counsel on the case management date, in the same order, judgment in default of appearance was recorded against the appellant in respect of the purchaser's counterclaim (the default order). It was ordered, inter alia, that the retention sum be forfeited by the purchaser.

[9] In pursuance of the default order, the respondent paid the retention sum to the purchaser. At this point in time, the appellant's appeal to the Court of Appeal against the default order of the High Court was still pending.

[10] Subsequently by an order dated 1 April 2008, the Court of Appeal allowed the appellant's appeal. The order of the High Court dated 24 February 2004 was set aside. The matter was remitted to the High Court for case management.

[11] In view of the above, the appellant by an originating summons dated 20 October 2008 applied for an order to compel the respondent to deposit into court the retention sum which had earlier been paid to the purchaser.

THE ISSUES

[12] The issue to be determined is whether in the light of the above the respondent as a stakeholder is entitled to release the retention sum to the purchaser.

IN THE HIGH COURT

[13] The High Court judge dismissed the appellant's claim on the ground that the respondent had acted in accordance with a lawful and valid court order. Furthermore, there was no order that the default order was stayed pending appeal. The appellant's claim was also found to be premature in that the appellant's right for the retention sum, if any, was still subject to the merits of the case being determined in a full trial.

IN THE COURT OF APPEAL

[14] Generally, a stakeholder has a duty to hold the sum in question as a stake pending the outcome of the event under a sale and purchase agreement. The manner in which the money is to be disposed depends on the terms of the agreement. Thus depending on the outcome, the money then becomes available to either the purchaser or the vendor. The position of a stakeholder was discussed in the Supreme Court decision of *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116. As this case

illustrates, it is trite law that until the event prescribed in the agreement between the parties is known, it is the stakeholder's duty to keep the stakeholding in his keeping.

[15] In the instant appeal, the entitlement to the retention sum became a subject matter of dispute in the writ action filed by the appellant against the purchaser. Pursuant thereto, the purchaser obtained judgment in default of appearance in respect of its counterclaim for forfeiture of the redemption sum by the purchaser. The default order was then served on the respondent. At this juncture, it is the respondent's case that the release of the money was effected in compliance with the default order.

[16] We are of the view that the question of whether the respondent is entitled to release the retention sum or otherwise, in addition to the scope of its responsibilities in respect thereto, lies within the four corners of the default order.

[17] It is our view that in the instant appeal, the default order does not require due compliance by the respondent. The particular order at para (6) reads as follows:

> 6) Satu deklarasi bahawa wang taruhan sebanyak RM500,000 dan faedah di atasnya yang dipegang oleh stakeholder Messrs Lai Kee Peng & Associates dilucutkan oleh Defend an Pertama

[18] As is clearly manifested in the above order, the remedy provided is only declaratory in nature. The purchaser was granted a declaration that the retention sum is to be forfeited by the purchaser. There was no direction given to the respondent to forthwith pay out the said retention sum to the purchaser. Thus the High Court judge had erred when she decided that the respondent had acted in accordance with a lawful and valid court order. We hold that by releasing the retention sum to the purchaser, the respondent was in error for which the respondent has to account to the appellant.

[19] It is also pertinent to note that vide the consent order of 24 October 1994, the respondent was also holding the retention sum as a stakeholder in favour of the group of purchasers. The respondent was therefore confronted with two High Court orders, namely the consent order and the default order. In the circumstances, the respondent had acted unreasonably in releasing the retention sum to their client when the default order contains no direction to that effect.

[20] Based on the above, we therefore allow this appeal with costs. The

respondent is ordered to deposit the retention sum under the SPA into court. Costs is fixed at RM10,000. Deposit to the respondent on account of costs.

Appeal allowed with costs fixed at RM10,000.

Reported by Kohila Nesan